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FCC Early Termination Fee Hearing
Wireless Docket 05-194
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Thank you for the opportunity to participate in this hearing.

The Commission should embrace the Black's Law Dictionary definition of "rate," which was relied upon by the Eleventh Circuit in the recent line item case[1] and by the D.C. Circuit in the 1987 *MCI* case.[2] That definition is: "A 'rate' is a charge to a customer to receive service"[3] and, as the D.C. Circuit held in the *MCI* case, an early termination fee is a "rate" under that definition. The D.C. Circuit affirmed the Commission's straightforward conclusion that ETFs are "rates" in that case because, in the absence of a termination charge, AT&T would have "raised its general rates."[4] In other words, the connection between ETFs and other charges in a carrier's rate structure is direct.

That is plainly the case here. Carriers offer plans with ETFs and without ETFs, and plans with ETFs either have lower monthly charges or

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[1] *NASUCA v. FCC*, 457 F.3d 1238 (11th Cir. 2006), *cert. denied sub nom. Sprint Nextel Corporation v. NASUCA*, 128 S. Ct. 1119 (2008).

[2] *MCI Telecommunications Corp. v. FCC*, 822 F.2d 80 (D.C. Cir. 1987).

[3] *See NASUCA v. FCC*, 457 F.3d at 1254; *MCI v. FCC*, 822 F.2d at 86.

[4] *MCI v. FCC*, 822 F.2d at 86.

lower handset charges or both. Because an adjustment to any one rate element in a carrier's rate structure will affect the other elements, each element is most reasonably considered to be a "rate element."

The Commission squarely adopted the "rate structure" approach to analyzing rates under section 332 in *Southwestern Bell Mobile Systems*.[5] That was a much harder case than this one because the issue was whether states may prohibit carriers from charging for incoming calls and rounding up in determining minutes of use – practices that, viewed in isolation, are not "rates." But the Commission preempted because of the direct effect of those practices on rates. The Commission correctly assumed that states are preempted from regulating the amount of charges imposed by wireless carriers. For example, it is perfectly clear that a state may not determine that $30 is too much to charge for 300 minutes of service per month or conclude that $30 a month is a reasonable charge for a "bucket of minutes" only if a carrier permits a subscriber to use at least 400 minutes of service. The issue in *Southwestern Bell Mobile Systems* was one step beyond those issues – it was what counts as a minute of service under a rate plan. The Commission concluded that such an issue could not be evaluated in isolation, and that regulation of what counts as a minute is preempted because of its direct effect on charges.

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[5] *In re Southwestern Bell Mobile Systems, Inc.*, 14 FCC Rcd 19898, ¶ 23 (1999).

The lesson to be drawn from *Southwestern Bell Mobile Systems* with respect to ETFs is that states may not regulate the amount of a charge imposed by a wireless carrier pursuant to a contract for the provision of wireless service because regulation of that sort will necessarily directly affect the carrier's rate structure. The Commission has never concluded that a charge imposed by a carrier on a customer pursuant to a contract to provide service is not a rate, and it could not reasonably do so consistent with the rate structure approach to analyzing section 332 that the Commission has long employed and the D.C. Circuit has upheld.

The district courts that have concluded that ETFs are not "rates" have usually been troubled by the argument that "rate" should be narrowly defined or all sorts of state laws would be preempted.[6] The Commission already has provided the basis for answering that concern, but has not yet spelled out the answer. In *Pittencrieff*, where the Commission upheld the imposition of state universal service fees, the Commission focused on the "indirect relationship" between the state universal service law and "the rates charged by a CMRS provider."[7] Similarly, in *Wireless Consumers Alliance* the Commission concluded "that imposition of a state damage award has merely an incidental

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[6] *See*, *e.g.*, *Phillips v. AT&T Wireless*, 2004 U.S. District LEXIS 14544 at 36 ("'rate' must be narrowly defined or there is no ability to draw a line between economic elements of the rate structure and the normal costs of operating a telecommunications business").

[7] *In re Petition of Pittencrieff Communications, Inc.*, 13 FCC Rcd 1735, ¶ 20 (1997).

effect upon the prices charged by a carrier."[8] Thus, the Commission has drawn a line between direct and indirect effects on rates. A charge to a subscriber imposed by a carrier plainly has a direct effect, while a cost imposed by the government on a carrier generally has an indirect effect on rates.

The Commission also should explain that ETFs are different than line items in a crucial respect emphasized by the Eleventh Circuit. That court held that a regulation prohibiting line items merely "affects the presentation of the charge on the user's bill, but it does not affect the amount that a user is charged for service."[9] It cannot seriously be argued that a prohibition on ETFs merely affects the presentation of charges on bills rather than the amount charged.

NASUCA emphasizes legislative history stating that "the Committee intends" that "terms and conditions" should include such matters as "the bundling of services and equipment."[10] That statement does not mention ETFs, and nothing in that statement suggests that regulations concerning charges imposed by a carrier on its subscribers are not prohibited rate regulation. In light of the language relating to "the bundling of services and

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[8] *In re Wireless Consumers Alliance, Inc.*, 15 FCC Rcd 17201, ¶ 34 (2004).

[9] *NASUCA v. FCC*, 457 F.3d at 1254.

[10] Letter from P. Pearlman et al. to M. Dortch, WT Docket No. 05-194 (May 20, 2008), at 2, *quoting* H.R. Rep. No. 103-111, 103d Cong., 1st Sess. (1993), *reprinted in* LEXSEE 103 H. Rpt., at 4 (1993).

equipment," it may be that the members of the House Committee thought that section 332 ought not be construed to prohibit states from barring carriers from requiring customers to buy handsets together with wireless service or from making rules governing such bundling. But their statement simply has nothing to do with ETFs.

Thank you.